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# Sexing *Harris*: The Law and Politics of the Movement to Defund Planned Parenthood

MARY ZIEGLER†

## INTRODUCTION

The movement to defund Planned Parenthood has opened a new front in the abortion wars. At the state and national level, anti-abortion organizations have campaigned successfully for new legal limitations on Medicaid or Title X reimbursement for Planned Parenthood.<sup>1</sup> Significantly, legal restrictions reach not only abortion but also other services like contraception and cancer screenings.<sup>2</sup> North Carolina,

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† Assistant Professor of Law, St. Louis University. I would like to thank Marcia McCormack and Sidney Watson for offering thoughts on this Article.

1. For examples of cases discussing these statutes, see *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 483-84, (M.D.N.C. 2011) (discussing 2011 N.C. Sess. Laws 145, § 10.19); *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1220 (D. Kan. 2011) (discussing 2011 Kan. H.B. 2014, § 107(l)); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 784 F. Supp. 2d 892, 897 (S.D. Ind. 2011) (discussing House Enrolled Act 1210, *codified at* IND. CODE § 5-22-17-5.5; IND. CODE § 16-34-2-1.1). For coverage of the effort to promote such legislation, see, for example, Jane Norman, *States Ramp Up Drive to Defund Planned Parenthood*, CONG. Q. HEALTHBEAT, July 1, 2011 (discussing the implementation, or consideration, of such statutes in Kansas, Texas, Wisconsin, North Carolina, Iowa, Indiana, and South Dakota); Jennifer Skalka, *Abortion Opponents Have a New Voice*, CHRISTIAN SCI. MONITOR, Aug. 15, 2011, at 24, 26 (reporting on the efforts of Americans United for Life in promoting legislation limiting funding for abortion); see also Cheryl Wetzstein, *GOP Has "Blueprint for Action" on Planned Parenthood*, WASH. TIMES, July 15, 2011, at A3 (reporting on Congressional calls for an investigation of Planned Parenthood's spending).

2. See, e.g., *Cansler*, 804 F. Supp. 2d at 484 ("[Planned Parenthood] provides non-abortion-related family planning health services as well. These . . . include cancer screenings (pap smears and breast exams); tests for diabetes, anemia, and high cholesterol; testing and treatment for sexually-transmitted infections; colposcopies; and contraceptives."); *Brownback*, 799 F. Supp. 2d at 1223 ("Each year, Planned Parenthood . . . receives some 9,000 birth control visits, and conducts approximately 3,000 pap tests, 3,000 breast exams, and 18,000 STD tests. Planned Parenthood also provides education services . . . ."); *Planned*

Wisconsin, and Indiana are among the states to have introduced such bans,<sup>3</sup> and the U.S. House of Representatives approved one before the proposal died in the Senate in April 2011.<sup>4</sup>

At first, the novelty of the movement seems to lie in its open hostility to contraception. Commentators have long suggested that the abortion debate truly concerns views about sex equality, motherhood, and non-marital, non-reproductive sex.<sup>5</sup> At last, it seems, those issues have come to the fore.<sup>6</sup> However, as this Article shows, the defunding movement has succeeded partly by deemphasizing the issue

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*Parenthood of Ind.*, 794 F. Supp. 2d at 897 (“HEA 1210 prohibits certain entities that perform abortions from receiving any state funding for health services unrelated to abortion—including for cervical PAP smears, cancer screenings, sexually transmitted disease testing and notification, and family planning services . . .”).

3. Norman, *supra* note 1; see also *ACLJ and 41 Members of Congress Urge Appeals Court to Back Indiana Law Defunding Planned Parenthood*, MANAGED CARE WEEKLY DIGEST, Aug. 22, 2011, at 2 (discussing the Indiana law).

4. See *House OKs End to Funds for Planned Parenthood*, ST. LOUIS POST-DISPATCH, Feb. 19, 2011, at A12 (discussing action in the House); Sabrina Eaton, *Senate Rejects Planned Parenthood Defunding*, PLAIN DEALER (Cleveland), Apr. 15, 2011, at A4 (describing the defeat of the defunding proposal in the Senate).

5. See, e.g., SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 250, 415 (Three Rivers Press 2006) (“By relabeling the terms of the debate over equality, [the New Right] discovered, they might verbally finesse their way into command. . . . [I]ts opposition to women’s newly embraced sexual freedom became ‘pro-chastity’; and its hostility to women’s mass entry into the work force became ‘pro-motherhood.’”); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 193 (1984) (“[T]his round of the abortion debate is so passionate and hard-fought because it is a referendum on the place and meaning of motherhood.” (emphasis omitted)); Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 263 (1992) (“A growing number of commentators have begun to address abortion regulation as an issue of sexual equality . . .”).

6. For commentaries of this kind, see Katha Pollitt, *Ban Birth Control? They Wouldn’t Dare . . .*, THE NATION, Oct. 24, 2011, at 10; Amanda Marcotte, *Why Fiscal Conservatives Should Embrace Planned Parenthood*, SLATE (Mar. 28, 2011), [http://www.slate.com/articles/double\\_x/doublex/2011/03/why\\_fiscal\\_conservatives\\_should\\_embrace\\_planned\\_parenthood.html](http://www.slate.com/articles/double_x/doublex/2011/03/why_fiscal_conservatives_should_embrace_planned_parenthood.html).

of contraception.<sup>7</sup> Instead, in its current incarnation, the movement represents itself as an effort to redefine and expand the limits on the abortion right set forth in the United States Supreme Court's 1980 decision in *Harris v. McRae*, the case that upheld the Hyde Amendment, a ban on the use of federal Medicaid funds for abortion services.<sup>8</sup>

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7. Leaders of the movement to defund Planned Parenthood do not mention opposition to contraception in justifying the defunding of the organization. See, e.g., *Planned Parenthood Exploits Women*, EXPOSE PLANNED PARENTHOOD, <http://exposeplannedparenthood.net/get-the-facts/planned-parenthood%E2%80%99s-history-of-exploiting-women-2/> (last visited Apr. 12, 2012) (opposing Planned Parenthood on the basis of allegations of providing misinformation to women and covering up sexual abuse); *Planned Parenthood and Your Tax Dollars*, EXPOSE PLANNED PARENTHOOD, <http://exposeplannedparenthood.net/get-the-facts/planned-parenthood-your-tax-dollars/> (last visited Apr. 12, 2012) (opposing Planned Parenthood based on allegations that the organization uses taxpayer dollars to fund abortions); *The Mona Lisa Project*, LIVE ACTION, <http://liveaction.org/monalisa> (last visited Apr. 12, 2012) (describing a scheme to catch Planned Parenthood violating mandatory sexual abuse reporting laws); *The Rosa Acuna Project*, LIVE ACTION, <http://liveaction.org/rosaacuna> (last visited Apr. 12, 2012) (describing a scheme to catch Planned Parenthood providing misinformation about abortion); *Top 12 Reasons to Defund Planned Parenthood Now*, THE SUSAN B. ANTHONY LIST, <http://www.sba-list.org/suzy-b-blog/top-12-reasons-defund-planned-parenthood-now> (last visited Apr. 12, 2012) (providing a variety of reasons, not including opposition to contraception, to oppose Planned Parenthood).

8. 448 U.S. 297, 326-27 (1980). For analyses of *Harris* and the abortion-funding cases, see Susan Frelich Appleton, *The Abortion-Funding Cases and Population Control: An Imaginary Lawsuit (And Some Reflections on the Uncertain Limits of Reproductive Privacy)*, 77 MICH. L. REV. 1688 (1979) (using a hypothetical case to explore a number of Supreme Court abortion-funding cases); Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981) (arguing that *Harris* and other abortion-funding decisions of the Supreme Court have created a greater judicial tolerance for state interference with fundamental rights beyond abortion); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1043 (1991) ("The governmental interest supported by the Hyde Amendment is to ensure that taxpayers who conscientiously believe that abortion is the taking of innocent human life are not coerced into paying for it. Nothing in the equal protection rationale casts doubt on the strength or legitimacy of that interest."); Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113 (1980) (arguing that *Harris* was wrongly decided as "fundamentally inconsistent" with *Roe v. Wade*).

*Harris* drew heavily on the idea that abortion was a negative right, a freedom from state meddling.<sup>9</sup> *Harris* further established that the state had no duty to help a woman effectuate that right.<sup>10</sup> Since 1980, the Supreme Court has continued to uphold bans on the use of public facilities or moneys for abortion.<sup>11</sup> However, the defunding movement is working to reinvent *Harris*.

The movement first seeks to expand the principle that abortion rights protect only against state interference. Statutorily and constitutionally, the movement stands for the idea that, under *Harris*, the state can refuse funds not only for abortion but also for other medical services offered by abortion providers.<sup>12</sup> The defunding movement works to expand what anti-abortion activists call the fungibility principle: the idea that money offered to any abortion provider for any service offsets other expenses, frees up funds for abortion, and thus constitutes money for abortion.

More importantly, the movement works to make the issue of funding one about sex equality and sexuality as much as about money. Why should Planned Parenthood be denied funding? In the political arena and in the courts, the movement's answer has been that women—and especially poor women of color—require protection. The defunding movement, however, offers women-protective arguments that differ considerably from those articulated in *Gonzales*

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9. See *Harris*, 448 U.S. at 314 (“[*Roe v. Wade*] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy . . .” (quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977))).

10. See *id.* at 316 (“[I]t simply does not follow [from *Roe v. Wade*] that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”).

11. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 510 (1989).

12. See, e.g., Susan A. Cohen, *What’s Behind the Antiabortion Campaign Over Fungibility?*, 1 GUTTMACHER REP. PUB. POL’Y, June 1998, at 1, 1-2, available at <http://www.guttmacher.org/pubs/tgr/01/3/gr010301.pdf>; Q & A About Planned Parenthood, EXPOSE PLANNED PARENTHOOD, <http://exposeplannedparenthood.net/get-the-facts/qa-about-planned-parenthood> (last visited Apr. 12, 2012).

*v. Carhart*, the Supreme Court's recent partial-birth abortion decision.<sup>13</sup>

*Carhart* has come to stand for the claim that abortion restrictions justifiably protect women from the psychological harms they will suffer as the result of regretting an abortion decision.<sup>14</sup> By contrast, the defunding movement draws on longstanding feminist anxieties about the power dynamics of heterosexual sexual relationships. Since the 1970s, some feminist theorists have problematized the relationship between sexual liberation, rape, and abortion.<sup>15</sup> If women still remain subordinate to men, then abortion services may facilitate women's sexual exploitation rather than their sexual liberation.<sup>16</sup> As the Article demonstrates, the defunding movement reworks this kind of argument,

13. 550 U.S. 124, 168 (2007).

14. See, e.g., Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 223 (2009); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1732 (2008); Reva B. Siegel, Lecture, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1641 (2008).

15. See, e.g., ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 267-74 (1977) ("Abortion is violence . . . It is the offspring, and will continue to be the accuser, of a more pervasive and prevalent violence, the violence of rapism."); Catharine MacKinnon, *The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion*, 17 RADICAL AM. 23, 25 (1983) [hereinafter MacKinnon, *The Male Ideology*] ("[M]any of abortion's proponents, who want to free women from reproduction in order to have sex, seem to share with abortion's opponents, who want to stick us with the consequences, the tacit assumption that women significantly *do* control sex. Feminist investigations suggest otherwise."); Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION 985, 987 (D. Kelly Weisberg ed., 1996) ("[A]bortion policy has never been explicitly approached in the context of how women get pregnant, that is, as a consequence of intercourse under conditions of gender inequality; that is, as an issue of forced sex.").

16. See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 99 (1987) ("[U]nder conditions of gender inequality, sexual liberation . . . does not free women; it frees male sexual aggression."); Katherine M. Franke, Essay, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 200 (2001) ("[S]ome legal feminists have framed the abortion issue as one that fundamentally involves enabling *men's* sexual pleasure on the one hand, and women's exploitation on the other."); MacKinnon, *The Male Ideology*, *supra* note 15, at 24.

playing on anxieties about consent and sexual coercion, arguing that Planned Parenthood aids and abets men who use women for sex by removing pregnancy as a consequence of wrongdoing.

The defunding movement deserves study not only because of the challenges it poses to conventional political arguments about abortion. The movement's use of litigation also offers important insight into the promise and limits of litigation for abortion opponents and grassroots activists more generally.<sup>17</sup> As we shall see, the defunding movement has had to translate its claims and worries into cognizable constitutional and statutory arguments, in the process, downplaying some of the most novel and powerful contentions that the movement has advanced. At the same time, in working within legal constraints, the defunding movement has identified and reworked an important part of the anti-abortion constitutional agenda: establishing that providers have no meaningful stake in the abortion right.<sup>18</sup>

The Article proceeds in three Parts. Part I situates the defunding movement in the history of the broader movement to defund the Left. Part II examines the history

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17. For studies on the limits and promise of litigation for social movement members, see SHARYN L. ROACH ANLEU, *LAW AND SOCIAL CHANGE* 244 (2d ed. 2009) ("Law provides resources for social change, for example legal language and the power of legal concepts that can be used to articulate identities or claims, but it also limits the capacity for social activism."); MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION*, at ix (1994) ("[L]aw, especially in its official guise, surely is a force that sustains hierarchical order, but I also show that it can be, in the hands of defiant citizens, a source of disorder and egalitarian reordering."); Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 145, 145-63 (Austin Sarat & Stuart A. Scheingold eds., 2006) (discussing how the use of litigation can make a movement become "disconnected" from its political and cultural strategies, and how it can create difficulties in trying to accurately represent diverse constituencies); cf. GORDON SILVERSTEIN, *LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* 124-27 (2009) (arguing that the use of litigation has not succeeded in the abortion context because it has not been used together with legislation and politics).

18. See *infra* Part III.E.

of the defunding movement. Part III sets forth and evaluates the movement's legal claims.

### I. DEFUNDING THE LEFT

The first major attack on Planned Parenthood funding came in the early 1980s, as part of a broader attempt to curb federal assistance for left-wing advocacy groups.<sup>19</sup> By that time, the birth control movement had transformed itself from an outlaw into a respected partner of the government.

In the 1910s, Margaret Sanger, the founder of a precursor of Planned Parenthood, had to defend herself and her organization from criminal charges under laws that described birth control advice or devices as "obscene."<sup>20</sup> By the mid-1960s, however, Planned Parenthood had helped to expand and legitimize a diverse family-planning movement.<sup>21</sup> Some of the movement's leading donors and members, like Dixie cup inventor Hugh Moore and Rockefeller family scion John D. Rockefeller III, joined the movement because of concerns about world population growth and its impact on famine, national security, and the spread of Communism.<sup>22</sup> Still others were interested in

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19. For a discussion of attempts to defund the Left, see RAYMOND ALBERT, *LAW AND SOCIAL WORK PRACTICE* 472 (2d ed. 2000); TIMOTHY CONLAN, *FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM* 244 (1998).

20. DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 10-11 (1994). The charges against Sanger, initially brought in 1914, were dropped by 1917. *Id.* at 11. For coverage of Sanger's trial, see 1 *THE SELECTED PAPERS OF MARGARET SANGER* 202-04 (Esther Katz et al. eds., 2003) (describing the trial using Sanger's own notes and letters).

21. See, e.g., DONALD T. CRITCHLOW, *INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA* 106-11 (1999) (discussing the workings of the family planning movement during the Johnson and Nixon administrations); cf. JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* 91-92 (2003) (describing the accomplishments of the family planning movement in the 1960s); JAE SILLIMAN ET AL., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* 54 (2004) (noting that the federal government funded family planning movements in the 1960s for the stated purpose of poverty relief).

22. CRITCHLOW, *supra* note 21, at 16; REBECCA M. KLUCHIN, *FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950-1980*, at 33 (2009);



women's rights or expressed hostility to morals regulations or to the influence of the Catholic Church.<sup>23</sup>

Beginning in the mid-1960s, Planned Parenthood and the family planning movement more broadly benefited from access to major foundations and influential donors. Moore led an organization, the Association for Voluntary Sterilization, focused on promoting sterilization as a family planning technique.<sup>24</sup> In 1965, he founded the Population Crisis Committee, a group focused on lobbying for domestic and international family planning.<sup>25</sup> Moore and Mrs. Philip Pillsbury helped to fund, in 1952, the formation of the International Planned Parenthood Federation.<sup>26</sup>

Moore was not alone in financing the growth of the family planning movement. Rockefeller spearheaded the formation of the Population Council, a group that sponsored family planning research and the provision of services in

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Donald T. Critchlow, *Birth Control, Population Control, and Family Planning: An Overview*, in *THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE* 1, 9 (Donald T. Critchlow ed., 1996).

23. See, e.g., Interview by Rebecca Sharpless with Phyllis Tilson Piotrow, Former Exec. Dir. of Population Crisis Comm. (now Population Action Int'l), in Bethesda, Md., at 32 (Sept. 16, 2002) (transcript available at <http://www.smith.edu/library/libs/ssc/prh/transcripts/piotrow-trans.pdf>) ("[P]art of my own personal motivation was that I very much resented the fact that an organization like the Catholic Church, which was very much of a hierarchy, consisting of celibate, old men . . . was making rules the women around the world were supposed to follow, even to their own death or detriment.").

24. Mary Ziegler, *The Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 *LAW & HIST. REV.* 281, 288 (2009) [hereinafter Ziegler, *The Framing of a Right to Choose*]; see also Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 *CARDOZO J.L. & GENDER* 319, 339-44 (2008) [hereinafter Ziegler, *Reinventing Eugenics*] (describing the goals of Moore and the sterilization movement).

25. CRITCHLOW, *supra* note 21, at 33, 66; see also Warren Weaver Jr., *Keating to Head Birth-Curb Drive*, N.Y. TIMES, Apr. 21, 1965, at 47 (reporting on the establishment of the Population Crisis Committee, including the involvement of former Senator Kenneth Keating).

26. MATTHEW CONNELLY, *FATAL MISCONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION* 168 (2008); CRITCHLOW, *supra* note 21, at 31-32.

the developing world.<sup>27</sup> The Ford, Scaife, and Sunnen Foundations also proved to be major sources of support.<sup>28</sup>

Together, Planned Parenthood and its allies secured financial support from the federal government. The family planning movement pushed successfully for the passage of the Family Planning Services and Population Research Act of 1970.<sup>29</sup> In the mid-1970s, through the efforts of the movement, the U.S. Agency for Development (“USAID”) made family planning (and even abortion) a central priority.<sup>30</sup>

With the election of Ronald Reagan in 1980, the recently mobilized “New Right” viewed the wealth and prominence of Planned Parenthood as part of a broader,

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27. See Ziegler, *Reinventing Eugenics*, *supra* note 24, at 331-33; see also CONNELLY, *supra* note 26, at 159-63 (describing the Council’s focus on policy research in “demography and contraception” and its advocacy of birth control as a “humanitarian gesture”); CRITCHLOW, *supra* note 21, at 16 (“While concerned about the problems of overpopulation in the world, including the United States, [the Population Council] viewed policy change as an incremental process that came from careful research and the persuasion of political leaders.”).

28. See CRITCHLOW, *supra* note 21, at 27-28 (describing the involvement of the Ford and Scaife Foundations); CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 221 (2000) (describing the involvement of the Sunnen Foundation).

29. 42 U.S.C. §§ 300 to 300a-6 (2006); see also 3 U.S. LAWS, ACTS, AND TREATIES 1123 (Timothy L. Hall & Christina J. Moose eds., 2003) (“On December 28, 1970, President Nixon signed into law the Family Planning Services and Population Research Act making contraception, excluding abortion, available to all American women as a vital means for improving the quality of life for all.”); Critchlow, *supra* note 22, at 13 (stating that the law established agencies to provide for family planning, and that Congress authorized \$382 million for family planning purposes in the following three years).

30. See, e.g., R.T. Ravenholt, *The A.I.D. Population and Family Planning Program—Goals, Scope, and Progress*, 5 DEMOGRAPHY 561, 571-72 (1968) (describing USAID’s goal of improving the health and economic status of people in developing countries by making family planning information and services, including abortion, available to them); see also CONNELLY, *supra* note 26, at 244 (describing USAID’s promotion of abortion and sterilization services in poor countries); MICHELLE GOLDBERG, THE MEANS OF REPRODUCTION: SEX, POWER, AND THE FUTURE OF THE WORLD 89 (2009) (“While Nixon inveighed against abortion to garner votes, . . . USAID . . . was pushing forward with new abortion methods.”).

unholy alliance between the political Left and the federal government. The founders of the New Right, which began as a tight-knit circle of social conservatives in Washington, DC, served as “the operations people,” in the words of one activist, for socially conservative organizations concerned about abortion, homosexuality, and prayer in the schools.<sup>31</sup>

Paul Weyrich, one of the leaders of the new movement, helped to co-found the Heritage Foundation, a conservative think-tank, in 1973.<sup>32</sup> The following year, with the financial backing of the Coors family, Weyrich founded the Committee for the Survival of a Free Congress (“CSFC”), a group dedicated to electing social conservatives to Congress.<sup>33</sup>

Weyrich saw his mission as the creation of a grassroots, politically pragmatic Right, a complement to the intellectuals who had dominated conservatism.<sup>34</sup> He explained to the press in November 1977: “Conservatives have been led by an intellectual movement but not a practical movement up to now . . . . We [now] talk about issues that people care about, like gun control, abortion, taxes and crime.”<sup>35</sup> Weyrich’s organizations provided

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31. See Dudley Clendinen, “*Christian New Right’s*” *Rush to Power*, N.Y. TIMES, Aug. 18, 1980, at B7.

32. See DANIEL K. WILLIAMS, *GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 169 (2010).

33. See WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA* 171 (rev. ed. 2005); see also Gillian Peele, *American Conservatism in Historical Perspective*, in *CRISIS OF CONSERVATISM?: THE REPUBLICAN PARTY, THE CONSERVATIVE MOVEMENT, AND AMERICAN POLITICS AFTER BUSH* 15, 28 (Joel D. Auerbach & Gillian Peele eds., 2011) (noting the financial backing of Coors). For further discussion of the New Right, see generally LAURA KALMAN, *RIGHT STAR RISING: A NEW POLITICS, 1974-1980* (2010) (providing a history of the Right in the latter half of the twentieth century); REBECCA E. KLATCH, *A GENERATION DIVIDED: THE NEW LEFT, THE NEW RIGHT, AND THE 1960S* (1999) (discussing the formation of the New Right through the efforts of Young Americans for Freedom, a youth organization of the 1960s led by William F. Buckley); *CONFRONTING THE NEW CONSERVATISM: THE RISE OF THE RIGHT IN AMERICA* (Michael J. Thompson ed., 2007) (a collection of articles describing the contours of the New Right’s ideology).

34. See MARTIN, *supra* note 33, at 169-70.

35. Richard Boeth et al., *The New Activists*, NEWSWEEK, Nov. 7, 1977, at 41.

valuable training and money to fledgling New Right causes: by 1978, the CSFC had raised \$400,000 and contributed to the election of thirty-one members of Congress.<sup>36</sup> While Weyrich provided political strategy for these groups, Richard Viguerie and his direct-mail organization offered lobbying and fundraising services.<sup>37</sup> By March 1977, Viguerie employed a staff of 250 and, over the course of 1977, his organization raised \$25 million for a variety of conservative causes.<sup>38</sup>

The first effort to defund Planned Parenthood had little to do with contraception or with abortion and more to do with interest in reshaping the broader partisan landscape. As part of this effort, following Reagan's election, the Heritage Foundation put out a book of policy suggestions entitled *Mandate for Leadership*.<sup>39</sup> Among other things, *Mandate for Leadership* proposed restrictions on the lobbying or advocacy that could be carried out by organizations receiving federal funds.<sup>40</sup> *Mandate for Leadership* also urged Congress to limit the circumstances under which groups primarily engaged in lobbying could be eligible for federal grants.<sup>41</sup>

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36. DONALD T. CRITCHLOW, *THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY* 129 (2007); see also Lou Cannon, *Tapping the Little Guy: Conservatives Broaden Financial Base*, WASH. POST, Mar. 6, 1977, at A1 (discussing the fundraising efforts of conservative political action groups).

37. See CRITCHLOW, *supra* note 36, at 130.

38. See *id.* at 129 (on the size of Viguerie's staff); John Herbers, *Interest Groups Gaining Influence at Expense of National Parties*, N.Y. TIMES, Mar. 26, 1978, at 1 (on the amount of money raised by Viguerie's organization).

39. MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION (Charles L. Heatherly ed., 1981).

40. See Dennis R. Hoover, *The Sources of Social Capital Reconsidered: Voluntary Associations, Advocacy, and the State*, in SOCIAL STRUCTURES, SOCIAL CAPITAL, AND PERSONAL FREEDOM 59, 76 (Dale McConkey & Peter Augustine Lawler eds., 2000) (describing *Mandate for Leadership* as one of the first documents to present the view that recipients of federal grants should not be able to lobby because "money is fungible").

41. See, e.g., Alfred S. Regnery, *Action, Legal Services Corporation and Community Services Administration*, in MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION, *supra* note 39, at 1059, 1064-66.

In 1983, the Office of Management and Budget translated these proposals into a proposed executive order.<sup>42</sup> The order defined a category of "political advocacy" as those activities attempting to influence a government policy decision.<sup>43</sup> The executive order provided that organizations engaged in such advocacy would be ineligible for federal funding.<sup>44</sup> The proposal brought on a firestorm of criticism, by a wide range of nonprofits, and within three years, the idea was abandoned.<sup>45</sup>

When Republicans retook Congress in the mid-1990s, the idea of defunding the Left temporarily took on new momentum.<sup>46</sup> The Stop Taxpayer-Funded Political Advocacy Act, sponsored by Representative Ernest Istook (R. Oklahoma), would have prohibited certain advocacy

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42. Hoover, *supra* note 40, at 77; *see also* Harold Wolman & Fred Teitelbaum, *Interest Groups and the Reagan Presidency*, in *THE REAGAN PRESIDENCY AND THE GOVERNING OF AMERICA* 297, 305 (Lester M. Salamon & Michael S. Lund eds., 1984) (describing the Office of Management and Budget's proposal to limit federal funding for organizations involved in "political advocacy"). For further discussion of the Reagan Administration's campaign to "defund the Left," *see*, for example, SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 177 (2010).

43. Wolman & Teitelbaum, *supra* note 42, at 305.

44. *Id.*; *see also* Michael S. Greve, *Why "Defunding the Left" Failed*, 89 PUB. INT., Fall 1987, at 91, 92 ("Conservative activists committed to defunding were appointed to . . . the Office of Management and Budget . . .").

45. ALBERT, *supra* note 19, at 472; *see also* Wolman & Teitelbaum, *supra* note 42, at 305 ("The proposed regulation was opposed by business-oriented and professional groups as well as social-advocacy ones. It was thus withdrawn . . .").

46. ALBERT, *supra* note 19, at 474; *see also* Karen W. Arenson, *Legislation Would Expand Restrictions on Political Advocacy by Charities*, N.Y. TIMES, Aug. 7, 1995, at A10 ("Conservative Republicans are trying to soften the voice of charities and other nonprofit groups . . . . The House last week approved legislation that would sharply circumscribe not just lobbying efforts, but also all other attempts to influence public policy at the national, state or local level by recipients of Federal grants."); Katharine Q. Seelye, *House Rule May Rein in Liberal Advocacy Groups*, N.Y. TIMES, Jan. 16, 1997, at B8 (discussing the passage of the "Truth in Testimony" rule, requiring any nongovernmental organization testifying in the House to disclose the amount of federal funds they received in the last three years).

organizations from receiving federal funds.<sup>47</sup> Other proposals considered by conservatives included “applying the Freedom of Information Act to organizations that receive federal funds, which would give GOP strategists a powerful investigative tool, and requiring groups whose representatives testify at congressional hearings to divulge their funding sources.”<sup>48</sup> Grover Norquist, a leading conservative activist, made clear that Planned Parenthood was a target of efforts to defund the Left.<sup>49</sup> On two separate occasions, Istook’s proposal failed to pass in the Senate, and efforts to defund Planned Parenthood stalled.<sup>50</sup> However, in the intervening years, as we shall see, an independent movement to defund Planned Parenthood emerged within the anti-abortion community.

## II. FROM ANTI-CONTRACEPTION TO WOMAN-PROTECTIVE: INVENTING THE DEFUNDING MOVEMENT

In 1974, the National Right to Life Committee (“NRLC”), the largest and most influential national anti-abortion organization,<sup>51</sup> found itself divided about the issue of Planned Parenthood. Conflict initially arose because two leading members of the NRLC, Dr. Frederick Mecklenburg and his wife, Marjory, were supporters of the family planning provider; Dr. Mecklenburg was even a member of

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47. Timothy C. Layton, Note, *Welfare for Lobbyists or Nonprofit Gag Rule: Can Congress Limit a Federal Grant Recipient’s Use of Private Funds for Political Activity?*, 47 SYRACUSE L. REV. 1065, 1067-68 (1997); see also Seelye, *supra* note 46 (noting that Istook’s proposed measure was “even broader” than the Truth in Testimony rule).

48. Jeff Shear, *GOP Catchphrase for the ‘90s: Defunding the Left*, BALTIMORE SUN, Apr. 23, 1995, at 1J.

49. See *id.*

50. MICHAEL O’NEILL, NON-PROFIT NATION: A NEW LOOK AT THE THIRD AMERICA 146 (2002).

51. FAYE D. GINSBURG, CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY 43-44 (1989). For further discussion on the NRLC, see CRITCHLOW, *supra* note 21, at 138-39; JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 20 (1998).

the Association of Planned Parenthood Physicians.<sup>52</sup> Randy Engel, a leading activist in Pennsylvania, wrote NRLC leaders to complain about the influence exercised by the Mecklenburgs.<sup>53</sup> In criticizing the Mecklenburgs, Engel also condemned Planned Parenthood, suggesting that the Mecklenburgs had "call[ed] for Uncle Sam to come into the bedroom of America."<sup>54</sup> Engel questioned whether anyone supportive of Planned Parenthood could be pro-life.<sup>55</sup>

Engel's positions reflected a particular view within the anti-abortion movement of the 1970s. Those who held similar beliefs, many of them conservative Catholics, like Engel, argued that condemnation of contraception was an integral part of opposing *Roe*.<sup>56</sup> There were a number of reasons activists held this position. First, many activists, like Notre Dame professor and veteran activist Charles Rice, believed that many contraceptives were abortifacients.<sup>57</sup> Others believed that a "contraceptive

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52. Memorandum from Pennsylvanians for Human Life, Biographies of Persons Attending Convention of National Importance in Right to Life Work 4-5 (1972) (The American Citizens Concerned for Life Papers, Gerald Ford Memorial Library, Univ. of Michigan [hereinafter American Citizens Concerned for Life Papers], Box 4); see also Fred E. Mecklenburg, M.D., Biographical Sketch (1974) (American Citizens Concerned for Life Papers, Box 15).

53. Memorandum from Randy Engel, Director-at-Large, NLRC, Inc., to Board of Directors, NRLC, Inc. et al. 5 (Mar. 30, 1974) (American Citizens Concerned for Life Papers, Box 8).

54. *Id.*

55. See *id.* at 6. These debates divided a major anti-abortion organization, the Americans United for Life, in the early 1970s. See Minutes of the Meeting of the Bd. of Dirs., Americans United for Life 4, 6-7 (Mar. 10-11, 1972) (The Executive File, Concordia Historical Inst. of the Lutheran Church Mo. Synod, St. Louis, Mo., Folder 91).

56. Michael W. Cuneo, *Life Battles: The Rise of Catholic Militancy Within the American Pro-Life Movement*, in BEING RIGHT: CONSERVATIVE CATHOLICS IN AMERICA 270, 280 (Mary Jo Weaver & R. Scott Appleby eds., 1995) (highlighting the positions taken by organizations like the American Life League that "[n]inety-nine percent of the time, contraception results in abortion," and that "[f]ar from reducing abortion, contraception leads almost inevitably to its dramatic increase").

57. See, e.g., Letter from Charles E. Rice, Professor of Law, Univ. of Notre Dame, to L. Brent Bozell (Mar. 15, 1972) (on file with author) ("We ought then to launch a new enterprise, including not just opposition to all abortion, but also opposition to all public involvement in contraception . . . ."); see also Cuneo,

mentality” or “birth control fever” had made abortion all but inevitable.<sup>58</sup>

In the 1970s, anti-abortion criticisms of Planned Parenthood did not ripen into an attack on the group’s funding; indeed, the NRLC still takes no official position on contraception.<sup>59</sup> Throughout the 1970s, however, activists openly hostile to contraception broke with the NRLC and mounted campaigns of their own. For example, Engel led the United States Coalition for Life (“USCL”), a group opposed to family planning and fetal research as well as abortion.<sup>60</sup> Founded in 1972, the USCL attracted several prominent anti-abortion hardliners, including Charles

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*supra* note 56, at 280 (discussing the view that contraceptives such as the pill and IUDs are abortifacients).

58. Pope Paul VI’s *Humanae Vitae* set forth the idea of a “contraceptive mentality.” See POPE PAUL VI, *HUMANAE VITAE: ENCYCLICAL LETTER OF HIS HOLINESS POPE PAUL VI ON THE REGULATION OF BIRTHS* 14 (rev. ed. 1983) (describing, as one of the “serious consequences” of contraception, “how wide and easy a road would thus be opened to conjugal infidelity and to a general lowering of morality”). For analysis of *Humanae Vitae* and the contraceptive mentality, see, for example, JANET E. SMITH, *HUMANAE VITAE: A GENERATION LATER* 32 (1991); Andrew Dutney, *Contraception*, in *THE OXFORD COMPANION TO CHRISTIAN THOUGHT* 134, 134-35 (Adrian Hastings et al. eds., 2000). On anti-abortion arguments about a “contraceptive mentality” and its relationship to the legalization of abortion, see, for example, MICHAEL W. CUNEO, *THE SMOKE OF SATAN: CONSERVATIVE AND TRADITIONALIST DISSENT IN CONTEMPORARY AMERICAN CATHOLICISM* 62 (Johns Hopkins Univ. Press 1999) (“Contraception was nothing less than the cultural gateway to abortion, they insisted . . . .”); CHARLES E. RICE, *BEYOND ABORTION: THE THEORY AND PRACTICE OF THE SECULAR STATE* 79 (1979) (“Widespread contraception tends to require abortion as a ‘backstop.’ And if abortion is readily available, people tend to be reluctant to bother with contraception.”).

59. On the NRLC’s position on contraception, see, for example, CUNEO, *supra* note 58, at 62 (“The NLRC, for its part, did everything possible to distance itself from [the contraceptive mentality] thesis, and in the process made a special point of declaring itself completely neutral on the subject of birth control.”); ALESHA E. DOAN, *OPPOSITION & INTIMIDATION: THE ABORTION WARS & STRATEGIES OF POLITICAL HARASSMENT* 90 (2007) (“The [NRLC] does not get involved or take positions on issues indirectly or marginally related to abortion such as contraception . . . .”).

60. For discussion of the founding of the USCL, see *Early History*, U.S. COALITION FOR LIFE: RESEARCH LIBRARY, <http://www.uscl.info/index.php?pr=History> (last visited Apr. 12, 2012).



Rice.<sup>61</sup> Later in the decade, Judie Brown, a former Executive Director of the NRLC, quit the organization to form the American Life League ("ALL"), a Catholic organization equally opposed to contraception and abortion.<sup>62</sup>

However, by the end of the mid-1980s, a freestanding movement to defund Planned Parenthood began to emerge. What was it about Planned Parenthood in particular that attracted the ire of abortion opponents? The organization has become a major abortion provider, at times competing with or replacing other clinics.<sup>63</sup> Since the late 1960s, Planned Parenthood has also been a prominent advocate of abortion rights.<sup>64</sup> As importantly, since the mid-1970s, Planned Parenthood has been central to the litigation efforts of the abortion-rights movement.<sup>65</sup> Defunding laws appear to reflect Planned Parenthood's importance as both an advocate for and a provider of abortion.

The first champion of the defunding movement, James Sedlak, a retired IBM engineer and a devout Roman Catholic, became active in 1985.<sup>66</sup> Sedlak and a group of

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61. See Charles E. Rice, *The Rice Statement*, 3 PRO-LIFE REP., Summer 1974, at 1, available at [http://uscl.info/edoc/doc.php?doc\\_id=76&action=inline](http://uscl.info/edoc/doc.php?doc_id=76&action=inline) (describing Rice's position on the USCL advisory board).

62. On Brown and the founding of the ALL, see CUNEO, *supra* note 58, at 62; CAROL MASON, KILLING FOR LIFE: THE APOCALYPTIC NARRATIVE OF PRO-LIFE POLITICS 109 (2002) (noting that the issue of abortion helped Brown to form the "radically conservative" ALL).

63. See LORI FREEDMAN, WILLING AND UNABLE: DOCTORS' CONSTRAINTS IN ABORTION CARE 147 (2010) ("Planned Parenthood is often the only clinic able to survive in the most politically hostile communities . . . ."); MELODY ROSE, SAFE, LEGAL, AND UNAVAILABLE?: ABORTION POLITICS IN THE UNITED STATES 90-92 (2007) ("[Planned Parenthood] is a formidable competitor in part because it is subsidized by its foundation, and can therefore afford to offer abortions at a lower cost. . . . [A]s the nation's largest provider, [it] probably has better name recognition than smaller, private clinics."); BARBARA M. YARNOLD, ABORTION POLITICS IN THE FEDERAL COURTS: RIGHT VERSUS RIGHT 44 (1995) ("[O]ver the course of time, the preexisting private abortion clinic, unable to compete with the lower fees offered by Planned Parenthood affiliates, is forced to go out of business.").

64. See Ziegler, *The Framing of a Right to Choose*, *supra* note 24, at 305-12.

65. See, e.g., YARNOLD, *supra* note 63, at 113.

66. See, e.g., Catherine Clabby, *Taking Aim at Planned Parenthood Sex Education, Abortion Make Agency's Demise His Life Goal*, ALBANY TIMES UNION,

local abortion opponents fought to prevent the opening of a clinic in Poughkeepsie, New York.<sup>67</sup> When his efforts were unsuccessful, Sedlak founded an organization committed exclusively to battling Planned Parenthood.<sup>68</sup>

Sedlak's organization, Stop Planned Parenthood ("STOPP"), focused first on reshaping the sex education programs offered in local public schools.<sup>69</sup> In many instances, local Planned Parenthood affiliates participated in these programs, providing students with information about contraception and sexually transmitted diseases.<sup>70</sup> In opposing the programs, Sedlak appealed directly to religious and social conservatives who subscribed to abstinence-only sex education.<sup>71</sup>

He also set out a blueprint for grassroots social and legal action. He urged concerned parents to attend school

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Sept. 27, 1992, at 11; see also *Newsroom: Jim Sedlak*, AM. LIFE LEAGUE, [www.all.org/newsroom/jim](http://www.all.org/newsroom/jim) (last visited Apr. 12, 2012) (describing Sedlak's professional career and his efforts in the pro-life movement).

67. See Clabby, *supra* note 66.

68. See *id.*; see also *About Us*, STOPP, <http://www.stopp.org/article.php?id=5247> (last visited Apr. 12, 2012) ("The purpose of STOPP is really quite simple. We intend to cause such discontent with Planned Parenthood that it will have no choice but to close its doors and get out of town!").

69. See Clabby, *supra* note 66; see also DOAN, *supra* note 59, at 164-65 ("Sedlak . . . believes that sex education programs are a marketing program for promiscuity and propaganda for pushing a pro-abortion agenda onto women.").

70. See JANICE M. IRVINE, *TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES* 89 (2004) (mentioning Planned Parenthood's involvement in sex education).

71. See Katie Walker, *Guttmacher Study Shows Devastating Consequences of Sex-Ed*, AM. LIFE LEAGUE (Jan. 27, 2010), <http://www.all.org/article/index/id/NTg2Mw/> (explaining Sedlak's current views on the importance of abstinence education). For discussion of the history of abstinence-only sex education and its religious and conservative connections, see IRVINE, *supra* note 70, at 102-03; Allan J. Cigler & Burdett A. Loomis, *Kansas: The Christian Right and the New Mainstream of Republican Politics*, in *GOD AT THE GRASS ROOTS*, 1996: THE CHRISTIAN RIGHT IN THE AMERICAN ELECTIONS 207, 213 (Mark J. Rozell & Clyde Wilcox eds., 1997) (noting the goal of the Christian Right in Kansas to elect members to the state board of education who will eliminate sex education classes); Karen (Kay) Perrin & Sharon Bernecki DeJoy, *Abstinence-Only Education: How We Got Here and Where We're Going*, 24 J. PUB. HEALTH POL'Y 445, 446-49 (2003).

board meetings, lobby board members, and threaten litigation against them.<sup>72</sup> Sedlak next publicized a strategy entitled "How to Dismantle Government Funding of Planned Parenthood."<sup>73</sup> There, Sedlak advised activists to focus on local, even county-level, funding for Planned Parenthood clinics.<sup>74</sup> Sedlak and his organization described their effort as a religious one, a fight against secular humanism—a belief system "which permit[ted] modification of moral rules to fit specific situations—over unyielding biblical commandments."<sup>75</sup>

Sedlak's attack on secular humanism echoed the work of evangelical theologian Francis Schaeffer. Schaeffer was best known for authoring two best-selling books, *How Should We Then Live?*<sup>76</sup> and *A Christian Manifesto*.<sup>77</sup> Both works provided a master narrative of the decline of Western civilization, as universal, divine teachings were supplanted by individualism, secularism, and moral relativism.<sup>78</sup> Schaeffer's works were popularized and widely disseminated, first in a film version of *How Should We Then Live?*<sup>79</sup> and then in books by major Religious Right figures like Timothy LaHaye, a founder of leading Religious Right organizations like the Moral Majority and Christian Voice.<sup>80</sup> Sedlak brought to bear his own interpretation of secular

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72. See Clabby, *supra* note 66.

73. *Id.*

74. *Id.*

75. *Id.*; see also Mark J. McGuire, *Ex-Teacher Takes on Planned Parenthood*, ALBANY TIMES UNION, Nov. 4, 1991, at B4.

76. FRANCIS A. SCHAEFFER, *HOW SHOULD WE THEN LIVE?: THE RISE AND DECLINE OF WESTERN THOUGHT AND CULTURE* (1976).

77. FRANCIS A. SCHAEFFER, *A CHRISTIAN MANIFESTO* (1981).

78. See SCHAEFFER, *supra* note 76, at 84, 216-18; SCHAEFFER, *supra* note 77 at 41-51; see also BARRY HANKINS, FRANCIS SCHAEFFER AND THE SHAPING OF EVANGELICAL AMERICA 196-200 (2008) (analyzing Schaeffer's work).

79. HANKINS, *supra* note 78, at 160-75 (describing the filming of *How Should We Then Live?*).

80. SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 142 (2010); see also TIM LAHAYE, *THE BATTLE FOR THE MIND* 101-03 (1980) (discussing Schaeffer's works).

humanism, linking it to his opposition to many forms of contraception, including the pill, the IUD, and Norplant.<sup>81</sup>

By 1992, STOPP had attracted the support and attention of Judie Brown's ALL.<sup>82</sup> The ALL had a broader reach than STOPP: in the early 1990s, the ALL had as many as 250,000 members.<sup>83</sup> However, like STOPP, the ALL has been viewed by some as an absolutist and religious organization,<sup>84</sup> a self-proclaimed Christian organization willing to condemn sex education as much as abortion.<sup>85</sup> The ALL's current projects are illustrative of its worldview and priorities. The organization is one of the chief supporters of personhood amendments<sup>86</sup>—state constitutional fetal life amendments opposed by some pragmatists within the anti-abortion movement.<sup>87</sup> The ALL also sponsors a project called "The Pill Kills," a program intended to demonstrate the abortifacient properties of the birth control pill.<sup>88</sup> Working with the ALL, STOPP, like the defunding movement more generally, represented a no-compromise position within the anti-abortion movement, committed to its principles under virtually all circumstances and at almost any cost.

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81. See Clabby, *supra* note 66.

82. *Id.*

83. *Id.*

84. See GORNEY, *supra* note 28, at 444-45 (explaining that some in the right-to-life movement saw Brown's pious, no-compromise style as deeply self-absorbed).

85. See Clabby, *supra* note 66 (describing STOPP).

86. *Personhood Now*, AM. LIFE LEAGUE, <http://www.all.org/nav/index/heading/MTE/cat/MTc1> (last visited Apr. 12, 2012).

87. See, e.g., Tom Curry, *Personhood Measure Divides Conservative Ranks*, FIRST READ (Nov. 7, 2011, 3:01 PM), [http://firstread.msnbc.msn.com/\\_news/2011/11/07/8684806-personhood-measure-divides-conservative-ranks](http://firstread.msnbc.msn.com/_news/2011/11/07/8684806-personhood-measure-divides-conservative-ranks) (discussing pragmatist, anti-abortion views on the personhood amendment); Melinda Henneberger, *Personhood Amendment Shows That "Pro-Life" Not a Monolith, Even on Roe v. Wade*, WASH. POST (Nov. 14, 2011), [http://www.washingtonpost.com/politics/personhood-amendment-shows-that-pro-life-not-a-monolith-even-on-ro-v-wade/2011/11/11/gIQAjKhDLN\\_story.html](http://www.washingtonpost.com/politics/personhood-amendment-shows-that-pro-life-not-a-monolith-even-on-ro-v-wade/2011/11/11/gIQAjKhDLN_story.html) (same).

88. See *The Pill Kills*, AM. LIFE LEAGUE, <http://www.all.org/nav/index/heading/MTE/cat/MTc5> (last visited Apr. 12, 2012).

Partly because of its absolutism, the defunding movement had only a limited influence in the 1990s and early 2000s. Sedlak did continue to promote his cause, giving talks in states like Pennsylvania and New Hampshire.<sup>89</sup> Sedlak and the ALL also fought to prevent the opening of new clinics in Los Angeles and Dallas-Fort Worth.<sup>90</sup> However, Sedlak focused increasingly on the religious, rather than legal, strategies available to his allies. He urged supporters to “spread . . . the message of Christianity . . . with its teachings on chastity and the family.”<sup>91</sup> He criticized Planned Parenthood not only for promoting “the religion of secular humanism” but also for “pushing and selling sex.”<sup>92</sup>

The arguments advanced by STOPP and the ALL likely had a certain principled or purist appeal to some members of the anti-abortion community. However, as we have seen, as both organizations framed it, the movement to defund Planned Parenthood was too sectarian and too ambitious in its agenda to achieve short-term legal goals.

A new defunding movement began to take shape in 2006 when Live Action, a recently formed anti-abortion organization, released its first undercover video.<sup>93</sup> Live Action was the brainchild of Lila Rose, then a history major at UCLA.<sup>94</sup> One of eight children, Rose had been homeschooled.<sup>95</sup> At age fifteen, she discovered the anti-

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89. See, e.g., Todd R. Weiss, *Pro-Life Speaker Urges Protestors to Pressure Planned Parenthood*, LANCASTER NEW ERA, May 12, 2000, at 9 (Pennsylvania); Stephen Beale, *Pro-Life Group Targets Planned Parenthood*, N.H. UNION LEADER, Oct. 30, 2006, at A2 (New Hampshire).

90. See, e.g., Lianne Hart, *Antiabortion Effort Targets Unbuilt Clinic*, L.A. TIMES, Dec. 14, 2003, at 20; Jay Root, *Abortion Opponents Pressure Clinic Contractors*, FT. WORTH STAR-TELEGRAM, Nov. 15, 2003, at 1A.

91. Beale, *supra* note 89.

92. *Id.*

93. Robin Abcarian, *Anti-Abortion Movement Gets a New-Media Twist*, L.A. TIMES, Apr. 26, 2009, at 1.

94. See Lila Rose, *Fighting for Life*, FIRST THINGS, Oct. 1, 2010, at 14, 14.

95. *Id.*

abortion writings of Dr. John and Barbara Willke, and she decided to form a pro-life group with several close friends.<sup>96</sup>

She stepped up her involvement several years later, after attending a UCLA meeting about student journals.<sup>97</sup> There, she met James O'Keefe, a fellow conservative who would become known for his efforts to expose the community organizing group ACORN.<sup>98</sup> O'Keefe and Rose conceived a plan to expose wrongdoing at Planned Parenthood.<sup>99</sup> A female decoy would pose as a fifteen-year-old, pregnant by her twenty-three-year-old boyfriend, and a video of the encounter would be made.<sup>100</sup>

Between 2006 and 2009, Live Action organized similar "stings" in Los Angeles, Indianapolis, Bloomington, Tucson, and Memphis.<sup>101</sup> Subsequent videos followed a similar pattern. The woman seeking an abortion was virtually always a minor.<sup>102</sup> On some occasions, a pimp would come on behalf of a juvenile sex worker.<sup>103</sup> On others, a minor dating an older man appeared.<sup>104</sup> The edited videos almost invariably showed a Planned Parenthood employee who seemed willing to provide abortion services irrespective of the woman's age.<sup>105</sup> As Rose would later stress, the employees also appeared willing to dodge legal

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96. *Id.*

97. *Id.*

98. See Scott Shane, *A Political Gadfly Lampoons the Left Via YouTube*, N.Y. TIMES, Sept. 19, 2009, at A9.

99. See Rose, *supra* note 94, at 15.

100. *Id.*

101. Abcarian, *supra* note 93; see also Charles Wilson, *Clinic Videos Spark Probe*, J. GAZETTE, Dec. 19, 2008, at 4C; Sandhya Somashekhar, *Anti-Abortion Group Releases Planned Parenthood Sting Video*, WASH. POST, Feb. 2, 2011, at A4; Steve Szkotak, *Abortion Foes Accuse Clinic of Advising How to Break Law*, HOUS. CHRON., Feb. 4, 2011, at A13.

102. See, e.g., Abcarian, *supra* note 93; Somashekhar, *supra* note 101; Wilson, *supra* note 101.

103. See, e.g., Josh Brown, *"Pimp" Video Stings Planned Parenthood*, WASH. TIMES, Feb. 1, 2011, at A5.

104. See, e.g., Abcarian, *supra* note 93; Wilson, *supra* note 101.

105. See, e.g., Abcarian, *supra* note 93; Brown, *supra* note 103; Somashekhar, *supra* note 101; Wilson, *supra* note 101.

requirements involving minors, including parental-notification abortion restrictions and child-abuse reporting laws.<sup>106</sup>

The videos depicted women whose consent to sex was ambiguous. The minors in Rose's videos were handicapped by age, financial dependence, and perhaps even the threat of violence at the hands of an older man. What was the role of Planned Parenthood in this equation? By providing abortion services, the videos suggested, Planned Parenthood facilitated the continued sexual exploitation of women. At the same time, by refusing to report sexual abuse or prostitution, Planned Parenthood appeared to deny vulnerable women legal protections otherwise available to them.

By projecting such images, Live Action's videos invoked anxieties that reached across the political spectrum. Beginning in the 1970s and 1980s, feminists like Susan Brownmiller problematized the distinction between consensual sex and rape. In her landmark work, *Against Our Will*, Brownmiller argued that rape was "nothing more or less than a conscious process of intimidation by which *all men keep all women* in a state of fear."<sup>107</sup> According to Brownmiller, the threat of rape shaped all women's sexual experiences, as well as women's historical social roles.<sup>108</sup> Similarly, in 1989, Catharine MacKinnon argued that, "under conditions of male dominance," it is difficult for women to distinguish between rape and consensual intercourse.<sup>109</sup> If male dominance and compulsory heterosexuality are common, MacKinnon suggests, "rape is indigenous, not exceptional, to women's social condition."<sup>110</sup>

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106. See Rose, *supra* note 94, at 15; see also Brown, *supra* note 103; Szkotak, *supra* note 101.

107. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15 (1975).

108. See *id.* at 11-15.

109. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 174 (1989).

110. *Id.* at 172. For critique of this kind of "dominance feminism," see Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); Franke, *supra* note 16, at 200-01.

In the late 1980s, MacKinnon's writings on abortion linked women's sexual vulnerability and political subjugation to the availability of abortion. She argued: "So long as women do not control access to our sexuality, abortion facilitates women's heterosexual availability. . . . The availability of abortion removes the one legitimate reason that women have had for refusing sex besides the headache."<sup>111</sup> Abortion, MacKinnon suggested, enables men to exploit women sexually without consequences.<sup>112</sup> Like other anti-abortion groups, Live Action echoed feminist claims about the ways in which women's financial or political vulnerability informed their sexual experiences.<sup>113</sup>

Live Action has also used its videos to demand the defunding of Planned Parenthood.<sup>114</sup> These efforts were somewhat successful: in 2009, the State of Tennessee terminated a \$721,000 contract with Planned Parenthood, and Orange County, California similarly ended a \$300,000 arrangement.<sup>115</sup> Rose achieved some prominence in conservative circles, giving speeches at ALL conferences and at the 2009 Value Voters Summit, a major gathering of social conservative voters, activists, and political leaders.<sup>116</sup>

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111. MACKINNON, *supra* note 16, at 99.

112. *See id.*

113. *See* Richard Stith, *Her Choice, Her Problem*, FIRST THINGS, Aug.-Sept. 2009 ("[T]o the degree that an economy employs mainly men, leaving women dependent on economic handouts, women will be much less likely to resist male pressures to make use of abortion."); *see also* Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 916 (2011) ("The legal availability of abortion has worked to detach men further from the potentialities of female sexuality, offering them the illusion that sex can finally be completely consequence-free. The trouble is that, for women, sex that results in pregnancy is fraught with consequence." (footnote omitted)); *Abortion: Male Coercion and Irresponsibility*, PROLIFEINFO.ORG, <http://www.prolifeinfo.org/fact5.html> (last visited Apr. 12, 2012) ("By vesting all reproductive responsibility in the woman, a pro-choice male creates a situation in which men can easily rationalize their irresponsibility toward women who choose not to abort.").

114. *See* Abcarian, *supra* note 93.

115. *Id.*

116. *See id.*



In 2011, several events launched Live Action and the defunding movement into the spotlight. The 2010 midterm elections brought unprecedented attention to the Tea Party and its calls for smaller government.<sup>117</sup> Chief among the congressional champions of the Tea Party was Indiana Representative Mike Pence,<sup>118</sup> a Republican who had been proposing defunding amendments to federal appropriations legislation since 2007.<sup>119</sup> Pence initially framed his proposal as an effort to fulfill the promise of the Hyde Amendment: "My point in offering this amendment today is that millions of pro-life Americans should not be asked to fund the leading abortion provider in the United States."<sup>120</sup> If abortion opponents could not be forced to subsidize abortion directly, they ought not be asked to do so indirectly—by financing the operation of Planned Parenthood.<sup>121</sup>

However, the defunding movement did not gain meaningful political momentum until February 2011, when, with considerable fanfare, Pence introduced a proposal in the House that would deny any and all federal funding to Planned Parenthood.<sup>122</sup> By that time, several powerful allies

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117. See Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES, Nov. 28, 2010 (Magazine), at 34-36 (predicting that Tea Party views will gain traction in the judiciary); Jeff Zeleny, *For Republicans, Too, a Broad Power Shift After the Elections*, N.Y. TIMES, Feb. 11, 2011, at A18 (discussing Tea Party influence over Republican spending policy); Kate Zernike, *Tea Party Gets Early Start on G.O.P. Targets for 2012*, N.Y. TIMES, Jan. 30, 2011, at A16 (discussing a Tea Party challenge to Sen. Richard Lugar and opposition to big government).

118. See Emma G. Fitzsimmons, *Mike Pence to Run for Governor of Indiana*, N.Y. TIMES BLOG (May 5, 2011, 2:14 PM), <http://thecaucus.blogs.nytimes.com/2011/05/05/mike-pence-to-run-for-governor-of-indiana/>.

119. See Press Release, Rep. Mike Pence, Rep. Pence Offers Amendment to Prohibit Taxpayer Dollars From Being Used to Fund Planned Parenthood (July 19, 2007).

120. *Id.*

121. See *id.* ("When Title X money goes to organizations that provide both abortions and family planning services, even though the money cannot directly fund abortions, it can be used to offset operational costs, freeing up money to promote and provide abortions.").

122. Erik Eckholm, *Budget Feud Ropes in Planned Parenthood*, N.Y. TIMES, Feb. 18, 2011, at A16; Kathleen Hennessey, *House Republicans See Timely Target in Planned Parenthood*, L.A. TIMES, Feb. 10, 2011, at A21; Peter Roff, *House Votes to Defund Planned Parenthood Over Abortion*, U.S. NEWS & WORLD

had emerged to combine the strands of argument offered by Pence and Live Action.<sup>123</sup> One was the Susan B. Anthony List ("SBAL"), an anti-abortion political action committee that spent \$11 million during the 2010 election cycle.<sup>124</sup> As we shall see, SBAL's involvement reflects the relationship between the defunding movement and a particular kind of "pro-life feminism."

SBAL was formed in the mid-1990s by leaders of Feminists for Life, an advocacy group that opposed abortion but endorsed the Equal Rights Amendment to the Constitution and other aspects of the second wave feminist agenda.<sup>125</sup> Over time, however, SBAL began to focus more exclusively on promoting any anti-abortion candidate, regardless of his or her stance on other women's issues.<sup>126</sup> At the same time, the organization crafted a number of new, pro-woman, anti-abortion claims. First, SBAL argued that first-wave feminism, like any authentic feminism, was pro-life.<sup>127</sup> As importantly, SBAL and its sympathizers argued

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REP. (Feb. 18, 2011), <http://www.usnews.com/opinion/blogs/peter-roff/2011/02/18/house-votes-to-defund-planned-parenthood-over-abortion>; see also Josh Brown, *N.J. Clinic Fires Manager After "Pimp" Video*, WASH. TIMES, Feb. 2, 2011, at A5 (reporting contemporaneous state budget cuts in New Jersey).

123. See, e.g., Eckholm, *supra* note 122 (describing the involvement of the Susan B. Anthony List); Stephanie Samuel, *Senate Votes Against Defunding Planned Parenthood Amid Outcry*, CHRISTIAN POST, Apr. 14, 2011 (reporting on the involvement of Susan B. Anthony List president Marjorie Dannenfelser, advocate Abby Johnson, and Live Action's Lila Rose).

124. Roff, *supra* note 122; see also Interview by Chuck Todd, MSNBC News, with Marjorie Dannenfelser, President, Susan B. Anthony List, (June 22, 2011) (reporting Dannenfelser's intention to support pro-life candidates "in every way that we possibly can in word and in deed," including financial support).

125. See, e.g., Valerie Richardson, *Feminist Launches PAC for Pro-Lifers*, WASH. TIMES, Nov. 7, 1992, at A1.

126. See Eliza Newlin Carney, *That Was the Year That Wasn't*, 26 NAT. J. 2751, 2751 (1994) ("The group helped to elect six new republican women to the House.").

127. See Press Release, Feminists for Life, *Feminists for Life Reveals Suffragists' Anti-abortion Stand* (Mar. 14, 1991) ("[The writings of pioneering feminists] disclose[ ] their firmly held belief that abortion is an act of violence against women and children, imposed by male-dominated society which denies them truly life-affirming choices."). See generally PROLIFE FEMINISM: YESTERDAY AND TODAY (Mary Krane Derr et al. eds., 1995). Of course, the historical account offered by Feminists for Life has provoked controversy. See Allison Stevens,

that women no longer needed abortion: since women had already achieved societal equality, they could bear and rear children, even those that were not planned, without sacrificing their careers or educations.<sup>128</sup> The defunding movement seems to offer a powerful vehicle for the SBAL's anti-abortion, pro-woman arguments. As Marjorie Dannenfelser of SBAL argued in February 2011: "Taxpayers have strongly rejected their complicity with Planned Parenthood in the sex trafficking of underaged girls."<sup>129</sup>

A second reason for the new prominence of the defunding movement was the involvement of Americans United for Life ("AUL"), arguably the leading pragmatist and litigation group in the anti-abortion movement.<sup>130</sup> AUL had a track record of law reform successes and, as of 2011, an annual budget of \$4 million.<sup>131</sup> The organization espoused an incrementalist strategy: advocates would not directly challenge *Roe*.<sup>132</sup> "AUL's goal is to eat away at the underpinnings of the protections provided by *Roe v. Wade*"<sup>133</sup>—as Charmaine Yoest of AUL put it, to let *Roe* "crumble under its own weight and become irrelevant."<sup>134</sup> Like the SBAL, AUL seems to fit naturally within the broader defunding movement. Legally, the movement expanded one of AUL's great successes: the defunding of

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*Susan B. Anthony's Abortion Position Spurs Scuffle*, WOMEN'S E-NEWS (Oct. 6, 2006), <http://www.womensenews.org/story/abortion/061006/susan-b-anthonys-abortion-position-spurs-scuffle> (noting pro-choice advocates' contention that Anthony did not publicize her views on abortion).

128. See Linda Feldman, *Sarah Palin—Feminist First, Tea Partyer Second*, CHRISTIAN SCI. MONITOR, May 14, 2010 (describing arguments of this kind made by Sarah Palin at an SBAL event).

129. Roff, *supra* note 122.

130. See Skalka, *supra* note 1, at 28.

131. *Id.*

132. *Id.* at 28-29; see also J. Margaret Datiles, *Drastic Reduction of Abortions in Michigan Demonstrate the Importance of Incremental Protections*, AMS. UNITED FOR LIFE (May 29, 2008), <http://www.aul.org/2008/05/drastic-reduction-of-abortions-in-michigan-demonstrate-the-importance-of-incremental-protections/> (praising incrementalist successes in Michigan).

133. Skalka, *supra* note 1, at 25.

134. *Id.* at 29 (quoting Charmaine Yoest).

abortion achieved by the Hyde Amendment and upheld in *Harris*.<sup>135</sup>

Together, in February 2011, AUL, the SBAL, and Live Action pushed for state and federal laws defunding Planned Parenthood.<sup>136</sup> Rarely did any activist from any organization mention contraception or opposition to it; instead, activists condemned Planned Parenthood for harming women and facilitating sex trafficking and sex abuse, and advocates criticized the government for forcing taxpayers to subsidize the organization.<sup>137</sup>

At the federal level, in 2011, the defunding movement failed to achieve its purpose: after the House voted 241-185 in favor of the Pence defunding bill, it failed in the Senate.<sup>138</sup> In many ways, however, the defunding movement has already reshaped the law of family planning funding. Federally, in response to a lengthy report by AUL, the House has opened an investigation into the use of federal funds by Planned Parenthood.<sup>139</sup> At the state level, Indiana

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135. See *Defending the Hyde Amendment: 30th Anniversary of Harris v. McRae*, AMS. UNITED FOR LIFE (June 21, 2010), <http://www.aul.org/2010/06/defending-the-hyde-amendment-30thanniversary> ("AUL successfully defended the Hyde Amendment before the U.S. Supreme Court in *Harris v. McRae* . . .").

136. See Szkotak, *supra* note 101 ("National anti-abortion groups have [used sting videos] to intensify their calls for federal legislation to cut off the more than \$350 million in annual federal family planning funds that Planned Parenthood receives."); see also Brown, *supra* note 122 (noting the involvement of Live Action and the SBAL in the sting of a New Jersey clinic); Hennessey, *supra* note 122 (reporting on the targeting of abortion clinics by Live Action).

137. See Roff, *supra* note 122 ("Taxpayers have strongly rejected [pro-choice] complicity with Planned Parenthood in the sex trafficking of underage girls." (quoting Marjorie Dannenfelser)); Szkotak, *supra* note 101 (reporting Live Action's view that Planned Parenthood is willing to "aid and abet in the sexual exploitation of minors and young women").

138. Jennifer Steinhauer, *Congress Passes Budget Bill But Some in G.O.P. Balk*, N.Y. TIMES, Apr. 15, 2011, at A1.

139. On the House investigation, see *Planned Parenthood Wrong in Denial of Financial Improprieties*, Notes Americans United for Life, MANAGED CARE WEEKLY, Oct. 10, 2011, at 67; Meghan McCarthy, *Republicans Open Sweeping Investigation into Planned Parenthood*, NAT. J. (Sept. 28, 2011, 7:58 AM), <http://www.nationaljournal.com/healthcare/republicans-open-sweeping-investigation-into-planned-parenthood-20110927>.

has barred Planned Parenthood from receiving any Medicaid reimbursement.<sup>140</sup> Kansas, Wisconsin, Texas, and North Carolina have also adopted some form of defunding proposal.<sup>141</sup>

Moreover, the defunding issue has also become a defining one for social conservatives; for some voters, a defunding pledge has become a litmus test for Republican candidates.<sup>142</sup> Formed in 2011, Expose Planned Parenthood, an organization that promotes the pledge, is a coalition that unites the SBAL and Live Action with veteran conservative groups like the Family Research Council and Concerned Women for America, testifying to the ongoing importance of the defunding issue to the anti-abortion movement.<sup>143</sup>

As we have seen, the defunding movement has not emphasized its opposition to contraception. However, it would be a mistake to read the current debate as one about tolerance of non-marital, non-reproductive sex. If anything, the movement has been influential partly because it has deemphasized the contraception issue and has rejected the anti-sex, anti-secularism arguments advanced by STOPP. Instead, the defunding debate has revived controversy about the relationship between abortion, fiscal conservatism, and equality. Does funding Planned Parenthood promote sex equality by ensuring access to valuable health services? Or does Planned Parenthood undermine equality for women by facilitating sexual exploitation?

The defunding movement deserves study not only because of the challenges it poses to conventional political arguments about abortion. The movement's efforts in the

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140. See IND. CODE § 5-22-17-5.5 (2011) (cancelling appropriations to entities that perform abortions).

141. See Norman, *supra* note 1 (describing defunding laws in those states).

142. See Kathryn Jean Lopez, *The Defunding Planned Parenthood Litmus Test?*, NAT'L REV. ONLINE (Apr. 2, 2011, 5:47 PM), <http://www.nationalreview.com/corner/263726/defunding-planned-parenthood-litmus-test-kathryn-jean-lopez>.

143. See *The Coalition*, EXPOSE PLANNED PARENTHOOD, <http://exposeplannedparenthood.net/the-coalition/> (last visited Apr. 12, 2012).

courts also offer important insight into the costs and benefits of litigation to social movement activists.

### III. NAVIGATING THE COURTS: THE DEFUNDING AGENDA

In North Carolina, Indiana, and Kansas, Planned Parenthood affiliates have challenged the constitutionality of defunding laws.<sup>144</sup> Preliminary injunctions issued by the lower courts have thus far turned primarily on whether Title X or the Medicaid statutes preempt state-level defunding legislation.<sup>145</sup> More subtly, the defunding litigation has become a contest about the proper constitutional framework that should be used to analyze the rights of abortion providers and the legitimacy of abortion-related funding restrictions. Significantly, the defunding movement portrays the disputed laws as reflecting disapproval of abortion services rather than abortion advocacy. In reviving the Supreme Court's unconstitutional-conditions doctrine, states and activists working with the movement intend to establish clearly that there is no right to perform an abortion.

#### A. *The Title X Litigation*

Kansas and North Carolina have passed laws that effectively prohibit Planned Parenthood from receiving funding under Title X of the Public Health Services Act.<sup>146</sup> Title X subsidizes family planning services for low-income individuals.<sup>147</sup> Under 42 U.S.C. § 300(a), the federal Department of Health and Human Services ("HHS") enters into contracts with "public or nonprofit private entities"

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144. *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 486 (M.D.N.C. 2011); *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1220 (D. Kan. 2011); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 897 (S.D. Ind. 2011).

145. *See Cansler*, 804 F. Supp. 2d at 488-92; *Brownback*, 799 F. Supp. 2d at 1228-32; *Planned Parenthood of Ind.*, 794 F. Supp. 2d at 910-12.

146. *See* 2011 N.C. Sess. Laws 145, § 10.19; 2011 Kan. H.B. 2014, § 107(l); *see also* 42 U.S.C. § 300(a) (2006).

147. *Cansler*, 804 F. Supp. 2d at 484.

responsible for the operation of family-planning projects.<sup>148</sup> In determining eligibility for such grants, HHS must “take into account the number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance.”<sup>149</sup> More specifically, eligible projects must “[p]rovide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including infertility services and services for adolescents).”<sup>150</sup> Service providers may receive grants directly from the federal government, or HHS may provide funding to state grantees who, in turn, contract with providers, as was the case in Kansas and North Carolina.<sup>151</sup>

Generally, state laws may be preempted by “express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment.”<sup>152</sup> Implied-conflict

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148. 42 U.S.C. § 300(a).

149. 42 U.S.C. § 300(b).

150. 42 C.F.R. § 59.5(a)(1) (2011). States defending their defunding statutes, like anti-abortion amici, have advanced a number of jurisdictional arguments. First, amici have contended that, because HHS could not compel states to delegate authority to Planned Parenthood, Planned Parenthood, as a third-party beneficiary, cannot compel them to do so. *See, e.g.*, Brief for Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Appellants and Reversal at 12-13, *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011) (No. 11-2464) [hereinafter *Eagle Forum Brief*]. The proper remedy, the argument goes, is for HHS to terminate offending states’ Title X funding. *See id.* at 16. For this reason, movement attorneys also contend that Planned Parenthood lacks a protected interest for the purposes of standing. *See id.* at 16-17. Movement lawyers further assert that Planned Parenthood cannot state a cause of action under either 42 U.S.C. § 1983 or directly under the Supremacy Clause. *See id.* at 18-24. Finally, movement attorneys suggest that the Eleventh Amendment bars Planned Parenthood’s claims. *See id.* at 17. Discussion of these claims is beyond the scope of this Article.

151. *See Cansler*, 804 F. Supp. 2d at 485; *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1221 (D. Kan. 2011).

152. *Lorillard Tobacco Co. v. Reilly*, 553 U.S. 525, 541 (2001) (internal citations omitted).

preemption, the kind at issue in the Title X cases, does not apply every time that a state statute creates an additional “modest impediment” to the eligibility of a particular provider.<sup>153</sup> However, “a state eligibility standard that altogether excludes entities that might otherwise be eligible for federal funds is invalid under the Supremacy Clause.”<sup>154</sup>

Kansas, North Carolina, and anti-abortion amici have primarily contended that their defunding laws do not conflict with Title X. In the Kansas case, for example, Eagle Forum, a socially conservative advocacy and litigation group founded by veteran conservative activist Phyllis Schlafly,<sup>155</sup> has stressed that Title X does not expressly state that its eligibility criteria are exclusive.<sup>156</sup> North Carolina, in *Cansler*, has made a similar argument.<sup>157</sup> States have also asserted that Planned Parenthood would suffer no cognizable injury under the defunding laws, since they could apply directly to the federal government for financial support.<sup>158</sup>

At least under existing precedent, these claims do not seem likely to succeed. As the Eagle Forum amicus brief in the Kansas case indicates, the defunding movement has effectively requested that only express preemption be considered.<sup>159</sup> Once implied-conflict preemption is

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153. *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 336-37 (5th Cir. 2005).

154. *Id.* at 337.

155. See DONALD T. CRITCHLOW, *PHYLLIS SCHLAFLEY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE* 3 (2005); CATHERINE E. RYMPH, *REPUBLICAN WOMEN: FEMINISM AND CONSERVATISM FROM SUFFRAGE THROUGH THE RISE OF THE NEW RIGHT* 187, 232 (2006); see also *Our Mission*, EAGLE FORUM <http://www.eagleforum.org/misc/descript.html> (last visited Apr. 12, 2012) (providing a current account of Eagle Forum's activities and beliefs).

156. See Eagle Forum Brief, *supra* note 150, at 30.

157. *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 491-92 (D.N.C. 2011) (“[North Carolina] contends that [Planned Parenthood] cannot establish a likelihood of success with respect to the Supremacy Clause claim because [the state criteria] do not conflict with Title X.”).

158. *E.g., id.* at 492.

159. Eagle Forum Brief, *supra* note 150, at 32 (arguing that Planned Parenthood cannot show a “clear and manifest congressional intent” to preempt).



considered, the defunding statutes appear much more constitutionally suspect; before the most recent rounds of litigation, several courts struck down laws denying Title X funds to entities that perform or counsel abortions.<sup>160</sup> At most, some courts have suggested that a state could require Planned Parenthood or any other provider to create a separate affiliate where abortions could be performed.<sup>161</sup>

The only remaining argument available to the defunding movement is one that attorneys have not made in the courts: that the plain language of Title X prohibits the provision of funds to abortion providers. Section 300a-6 states that none of the funds appropriated under Title X "shall be used in programs where abortion is a method of family planning."<sup>162</sup> However, as the Fifth Circuit has concluded, both the text of Title X and the reasoning of the Supreme Court's recent decision in *Rust v. Sullivan* suggest that Title X funds are available to abortion providers but not for the provision of abortion services.<sup>163</sup> An argument to the contrary seems unlikely to succeed.

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160. See, e.g., *Valley Family Planning v. North Dakota*, 661 F.2d 99, 100 (8th Cir. 1981) (holding that a state statute withholding Title X funds from any entity that performs, refers, or encourages abortions was in conflict with Title X and was therefore invalid under the Supremacy Clause); *Planned Parenthood of Billings, Inc. v. Montana*, 648 F. Supp. 47, 51 (D. Mont. 1986) (holding that a state proviso making funds for family services contingent on the requirement that the services were not provided in the same facility as abortions violated the Supremacy Clause).

161. See, e.g., *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 463-64 (8th Cir. 1999) (holding that a state statute excluding abortion providers from receiving state family planning funds would be an unconstitutional penalty under *Rust* unless construed to allow grantees to create independent affiliates that could perform abortions); *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 945 (9th Cir. 1983) (holding that a state statute could "forbid entities receiving state funds from using those funds for abortions and . . . related activities," but rejecting the contention that a state could refuse to fund otherwise eligible activities "merely because they engage in abortion-related activities disfavored by the state," and remanding for a determination of whether withdrawal of all state funds was the only way to ensure that state funds were not used for abortion-related activities).

162. 42 U.S.C. § 300a-6 (2006).

163. See *Rust v. Sullivan*, 500 U.S. 173, 198 (1991) ("By requiring that the Title X grantee engage in abortion-related activity separately from receiving federal funding, Congress has . . . not denied it the right to engage in abortion-

### B. *The Medicaid Litigation*

Indiana's defunding law, regarding the federal Medicaid law, has attracted the most attention from anti-abortion amici. The American Center for Law and Justice, an evangelical Protestant and socially conservative litigation group affiliated with Reverend Pat Robertson,<sup>164</sup> has submitted an amicus brief on behalf of itself and forty members of Congress, including former presidential candidate Michelle Bachmann.<sup>165</sup> The Thomas More Law Center, a Catholic, anti-abortion litigation organization,<sup>166</sup> has submitted its own amicus brief,<sup>167</sup> as has the Eagle Forum.<sup>168</sup>

The central issue in the case concerns the proper interpretation of the Medicaid "freedom of choice"

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related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X program in order to ensure the integrity of the federally funded program."); *see also* *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 339-41 (5th Cir. 2005) ("The Supreme Court [in *Rust*] . . . expressly stated that grant recipients could continue to provide abortion services outside the scope of the Title X project.").

164. *See* HANS J. HACKER, *THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION* 34-35 (2005); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 26 (2008); *see also* *Our Mission*, AM. CTR. FOR LAW & JUSTICE, <http://aclj.org/our-mission> (last visited Apr. 12, 2012) (providing a description of the American Center for Law and Justice's current activities).

165. Amicus Curiae Brief for the American Center for Law and Justice et al. Supporting Defendants-Appellants and Reversal, *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011) (No. 11-2464) [hereinafter American Center for Law & Justice Brief].

166. *See* SOUTHWORTH, *supra* note 164, at 197 n.17; *see also* *History of the Law Center*, THOMAS MORE LAW CTR., <http://www.thomasmore.org/about/history-law-center> (last visited Apr. 12, 2012) (providing an account of the Center's current activities).

167. Brief Amicus Curiae of Members of the Indiana General Assembly in Support of Defendants-Appellants and in Support of Reversal, *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011) (No. 11-2464) (filed by the Thomas More Center) [hereinafter Indiana General Assembly Brief].

168. Eagle Forum Brief, *supra* note 150.

provision.<sup>169</sup> Jointly funded by the states and the federal government, Medicaid pays for medical services for low-income individuals.<sup>170</sup> States choosing to participate in Medicaid must submit plans detailing their proposed use of federal funds.<sup>171</sup> The Regional Administrators of the Centers for Medicare and Medicaid Services, to whom the Secretary of HHS delegated power, then review the plans for compliance with federal rules and regulations.<sup>172</sup>

So long as a state complies with federal norms, it has “substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage.”<sup>173</sup> However, the Supreme Court has interpreted 42 U.S.C. § 1396 to provide Medicaid recipients with a right “to choose among a range of qualified providers, without government interference.”<sup>174</sup>

Planned Parenthood has argued that Indiana’s defunding law violates the freedom of choice provision, preventing recipients from obtaining services from otherwise qualified providers.<sup>175</sup> Members of the defunding movement reply that states have the authority, under the Medicaid statute, to decide that Planned Parenthood is not a qualified provider.<sup>176</sup>

This argument relies primarily on the text of the Medicaid Act itself, which states that, “[i]n addition to any other authority, a State may exclude any individual or entity [from participating in its Medicaid program] for any reason for which the Secretary [of HHS] could exclude the individual or entity from participation [in Medicaid].”<sup>177</sup>

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169. *See Planned Parenthood of Ind.*, 794 F. Supp. 2d at 899.

170. 42 U.S.C. § 1396a(a)(10)(A)(iv) (2006).

171. *See Cmty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 134 (2d Cir. 2002).

172. *See id.*

173. *Alexander v. Choate*, 469 U.S. 287, 303 (1985).

174. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980) (emphasis omitted).

175. *See Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 899 (S.D. Ind. 2011).

176. *See id.* at 903-04.

177. 42 U.S.C. § 1396a(p)(1) (2006) (emphasis added).

Some case law also supports the claim that states may, for any reason, define a provider as being unqualified.<sup>178</sup>

The best statutory arguments on the other side rely on the legislative history of § 1396.<sup>179</sup> As the court explained in *Planned Parenthood of Indiana*, the only Medicaid defunding case decided at this writing, the legislative history of the freedom of choice provision suggests that it was designed to prevent “fraud and abuse” and protect patients against “incompetent practitioners and from inappropriate or inadequate care.”<sup>180</sup> As yet, in the Medicaid litigation, there have been no allegations that Planned Parenthood provides incompetent care.<sup>181</sup>

If *Planned Parenthood of Indiana* reaches the Supreme Court, the case may revive an ongoing debate about the relative merits of purposive and textual interpretation.<sup>182</sup> However, as we shall see, for cause lawyers, the true stakes may lie elsewhere.

### C. Rust Revisited

The defunding movement has revived issues addressed in *Rust v. Sullivan*, the last case to deal with abortion-based restrictions on Title X funding.<sup>183</sup> *Rust* ultimately upheld

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178. See, e.g., *First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) (holding that states could “exclude an entity from its Medicaid program for any reason established by state law”); *Kelly Kare, Ltd. v. O’Rourke*, 930 F.2d 170, 178 (2d Cir. 1991) (concluding that New York did not violate the freedom of choice provision when it unilaterally ended a contract with Medicaid provider without cause).

179. S. REP. NO. 100-109, at 1-2 (1987), reprinted in 1987 U.S.C.C.A.N. 682, 682.

180. *Planned Parenthood of Ind.*, 794 F. Supp. 2d at 904 (emphasis omitted) (quoting S. REP. NO. 100-109, at 1-2).

181. See *id.* (“[T]here are no allegations that [Planned Parenthood of Indiana] is incompetent or that it provides inappropriate or inadequate care.”).

182. For a discussion of the debate between purposive and textual modes of statutory interpretation, see, for example, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761-64 (2010).

183. 500 U.S. 173, 175-78 (1991). Scholars have argued that *Rust* signaled a retreat from First Amendment protections against compelled speech, especially

regulations promulgated by the Secretary of Health and Human Services prohibiting the use of Title X funds for programs in which abortion counseling, referrals, or promotion were included.<sup>184</sup> As in the defunding cases, the petitioners in *Rust* argued that the regulations violated the First Amendment rights of physicians and providers who received Title X funds.<sup>185</sup> By prohibiting all discussion or advocacy of abortion, the regulations arguably constituted impermissible content-based discrimination.<sup>186</sup> For the purpose of understanding the defunding cases, however, we will focus on *Rust's* analysis of unconstitutional-conditions doctrine. As in the defunding cases, the petitioners in *Rust* argued that the regulations burdened doctor-patient dialogue and a woman's right to make an informed decision.<sup>187</sup>

The two claims discussed in *Rust*—those based alternatively on abortion advocacy and abortion services—have become possible constitutional frameworks for analyzing defunding reforms. For strategic reasons, as this Article will show, state governments and anti-abortion organizations argue that the laws reflect disapproval not of

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in the abortion context. See, e.g., Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey*, 95 COLUM. L. REV. 1724, 1725 (1995) (arguing that *Rust* reflects the Court's willingness to treat abortion counseling as a non-speech activity); Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 STAN. L. REV. 185, 199-200 (1992) (expressing concerns about *Rust's* implications for content-based regulations of speech).

184. *Rust*, 500 U.S. at 177-80.

185. *Id.* at 192.

186. *Id.*

187. *Id.* at 201-02. A number of scholars have criticized the use of unconstitutional-conditions doctrine in *Rust*. See, e.g., David Cole, *Beyond Unconstitutional Conditions: Chartering Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 679-80 (1992); Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1579-1612 (1994); Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 605 (1993). While I share many of the concerns expressed by these scholars, this Article focuses on the meaning, rather than the merits, of *Rust*.

Planned Parenthood's advocacy but rather of the abortion services it provides.

D. *Planned Parenthood as Advocate*

Defunding statutes have raised questions about the reach of the Court's unconstitutional-conditions cases, beginning with *Speiser v. Randall* in 1958.<sup>188</sup> *Speiser* held unconstitutional a California property tax exemption available to honorably discharged veterans only if they signed a pledge not to advocate the violent overthrow of the United States government.<sup>189</sup> The *Speiser* Court held that the law created an unconstitutional condition, reasoning that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."<sup>190</sup> The doctrine reappeared in 1972, in *Perry v. Sindermann*, a case involving a Texas junior college professor claiming to have been terminated on the basis of legislative testimony criticizing the state university system.<sup>191</sup> In that case, the Court reiterated that the government could not use conditions on a benefit to "produce a result which [it] could not command directly."<sup>192</sup>

If Indiana or North Carolina has targeted Planned Parenthood as the result of its advocacy, are the state defunding laws constitutional? The Court's past unconstitutional-conditions cases raise more questions than they answer. Moreover, the relationship between *Rust* and earlier unconstitutional-conditions cases is ambiguous: is

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188. 357 U.S. 513 (1958). In the *Lochner* era, the Court also defined some conditions to be unconstitutional. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1417, 1431-32 (1989).

189. *Speiser*, 357 U.S. at 514-15.

190. *Id.* at 518.

191. 408 U.S. 593, 595 (1972).

192. *Id.* at 597 (quoting *Speiser*, 357 U.S. at 526). Other unconstitutional conditions in the period involved the Free Exercise Clause of the First Amendment and the right to travel. See *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (holding unconstitutional a one-year residency requirement for welfare benefits that "penalized" those exercising the right to travel); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (holding unconstitutional, on free-exercise grounds, the firing of a Jehovah's Witness unable to work on Saturday).

the decision distinguishable from earlier unconstitutional-conditions cases, or does it represent a substantial retreat from them?

The answer may depend partly on one of the distinctions stressed in *Rust*: the difference between restrictions on a grant recipient and the subsidization of a protected activity.<sup>193</sup> The Court has offered several glosses on this distinction. First, as provided in *Speiser*, the State may not seek to "suppress[ ] . . . dangerous ideas"<sup>194</sup> in setting forth the conditions created for receiving a benefit. Second, the State may not withhold all permitted "benefits from an otherwise eligible candidate simply because that candidate has exercised her constitutionally protected freedom . . . ."<sup>195</sup>

Compare the Court's decision in *Harris* with *FCC v. League of Women Voters*, a case involving a provision of the federal Public Broadcasting Act that required grant recipients to refrain from all editorializing.<sup>196</sup> In striking down the measure in *League of Women Voters*, the Court stressed that local stations would be "barred from using even wholly private funds to finance . . . editorial activity."<sup>197</sup> By accepting federal funds, broadcasters agreed, in effect, to give up all editorializing activities, even those not subsidized by the government.<sup>198</sup> By contrast, in *Harris*, the Court stressed that Congress could refuse to fund abortion but may not have the same freedom to withhold other Medicaid benefits from a woman who chooses abortion.<sup>199</sup>

As the lower courts have made clear, Planned Parenthood seems to benefit from this recipient-subsidy distinction. Defunding laws target a particular recipient—Planned Parenthood or abortion providers—as opposed to

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193. *Rust v. Sullivan*, 500 U.S. 173, 197 (1991).

194. *Speiser*, 357 U.S. at 519 (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950)).

195. *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980).

196. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 366 (1984).

197. *Id.* at 400.

198. *See id.*

199. *Harris*, 448 U.S. at 317 n.19.

impacting a protected activity.<sup>200</sup> Moreover, the defunding laws deny Planned Parenthood other benefits under Title X or the Medicaid statutes because of the group's abortion activities.<sup>201</sup>

*Rust*, however, complicates this picture. The regulations analyzed in that case provided that no Title X funds could be used for counseling or referrals describing abortion as a method of family planning.<sup>202</sup> The Court described these regulations not as a penalty on abortion providers but rather as a neutral requirement of participation in Title X programs.<sup>203</sup> But how are the facts in *Rust* any different from those in *League of Women Voters*? The projects affected by the Title X regulations had to give up all abortion-related advocacy in order to receive federal funds, just as broadcasters in *League of Women Voters* had to refrain from editorializing in order to qualify for a grant.<sup>204</sup> What would stop lawmakers from simply reframing penalties on a particular recipient as eligibility criteria? Could not the California lawmakers in *Speiser* simply have argued that advocates of the violent overthrow of the U.S. government had to abandon those views insofar as they participated in a particular tax program?<sup>205</sup>

The answer might come from a second distinction offered in *Rust*—the ease with which a recipient can

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200. See, e.g., *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 493-95 (M.D.N.C. 2011) (“[W]hile the state is indeed free to limit funding for particular projects, including limiting funding for abortion services, that does not leave the state free to restrict a particular grantee from receiving funding for other, eligible projects.”); *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1232 (D. Kan. 2011) (reasoning, for the purposes of a preliminary injunction, that a defunding law was “unconstitutional as an attempt to punish the plaintiff for its support for abortion rights and its association with abortion services providers”).

201. *Cansler*, 804 F. Supp. 2d at 493; *Brownback*, 799 F. Supp. 2d at 1234.

202. See *Rust v. Sullivan*, 500 U.S. 173, 179 (1991).

203. See *id.* at 196-98.

204. Compare *Rust*, 500 U.S. at 197, with *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 400 (1984).

205. Compare *Rust*, 500 U.S. at 197, with *Speiser v. Randall*, 317 U.S. 513, 518-19 (1958).



separate funded and prohibited activities.<sup>206</sup> The *Rust* Court put a good deal of emphasis on the fact that Title X grantees could carry on abortion-related activities outside the scope of the program in question.<sup>207</sup> The Court reasoned further that the regulations required "a certain degree of separation."<sup>208</sup>

The theme of ease of separation runs through many of the Court's unconstitutional-conditions cases. In a 1983 case, *Regan v. Taxation With Representation*, the Court highlighted this factor.<sup>209</sup> *Regan* involved a challenge to the restriction on substantial lobbying activities for organizations receiving tax exempt status under Section 501(c)(3) of the Internal Revenue Code.<sup>210</sup> The *Regan* Court pointed to the ease with which organizations could, under Section 501(c)(4), create a separate organization to carry on lobbying while retaining their tax exempt status.<sup>211</sup> By contrast, in *League of Women Voters*, the Court viewed the separation of funded and prohibited activities as being quite difficult.<sup>212</sup> There, the Court stressed, broadcasters would have difficulty segregating funded activities from editorializing and could not pursue editorializing even with the use of private money.<sup>213</sup>

Where do the defunding laws fall along this spectrum? Laws prohibiting Planned Parenthood from receiving Medicaid or Title X funds would seem quite difficult to satisfy. In Indiana, Planned Parenthood already uses only private funds for abortion services and takes steps to ensure that no federal funds are commingled with those earmarked for abortion services.<sup>214</sup> In Kansas, Planned Parenthood

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206. *See Rust*, 500 U.S. at 197.

207. *Id.* at 197-98.

208. *Id.* at 198.

209. 461 U.S. 540, 544 (1983).

210. *Id.* at 542-43.

211. *Id.* at 544.

212. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399-400 (1984).

213. *Id.* at 400.

214. *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 898 (S.D. Ind. 2011).

ensures that abortions are provided in separate facilities and funded only by private actors.<sup>215</sup> To qualify under the defunding laws, the organization might have to create a new name, building, or identity.

Again, however, *Rust* muddies the waters. If the State enjoys substantial latitude in setting the eligibility criteria for participation in a particular program, what is to stop Indiana from arguing that not providing any abortion service is a criterion for participating in the state Medicaid program? Moreover, *Rust* and the cases to follow it suggest a general retreat from the Court's unconstitutional-conditions cases.<sup>216</sup> First, *Rust* seems to interpret *Maher v. Roe*<sup>217</sup> and *Harris*, the Court's abortion-funding cases, as recognizing an "authority . . . to subsidize family planning services which will lead to conception and childbirth, and declining to 'promote or encourage abortion.'"<sup>218</sup> Does this mean that states have substantial latitude to express disapproval of abortion, even by penalizing abortion providers offering other medical services?

Finally, *Rust* suggests that funding conditions may be unconstitutional only if they "force the . . . grantee to give up" the constitutionally protected activity in question.<sup>219</sup> But few funding restrictions force anyone to do anything.

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215. See *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1223 (D. Kan. 2011).

216. See, e.g., *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 59-60 (2006) ("This case does not require us to determine when a condition placed on university funding goes beyond [a] 'reasonable' choice . . . and becomes an unconstitutional condition."); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 211 (2003) ("[E]ven assuming that appellees may assert an 'unconstitutional conditions' claim, this claim would fail on the merits.").

217. 432 U.S. 464, 473-74 (1977).

218. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). In other contexts, the Court has also approved of what it characterizes as a refusal to subsidize an activity. See, e.g., *Lyng v. UAW*, 485 U.S. 360, 369 (1988) (upholding a law restricting food stamp eligibility of striking workers and their families as a permissible refusal to subsidize); *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (concluding that Congress's denial of a business expense deduction was a refusal to subsidize an activity rather than an unconstitutional condition).

219. *Rust*, 500 U.S. at 196.

Denying funding to Planned Parenthood would not formally prevent the organization from performing abortions or any other family planning service, even if its practical impact on those services would be devastating. Perhaps the Court has made its dicta in the abortion-funding cases into something of a rule: a state funding restriction is permissible so long as it leaves the speaker in the same position that would exist were there no state funding at all.<sup>220</sup> If a woman is too poor to afford an abortion, *Harris* suggests, the government is not responsible, since the law does not make the woman poor.<sup>221</sup> By extension, if Planned Parenthood cannot, without state assistance, afford its advocacy, the Court may not hold the state responsible.

As we shall see, however, states and movement attorneys supporting the defunding movement insist that they are not suppressing ideas but rather are defunding non-expressive conduct. Why might movement attorneys prefer to portray Planned Parenthood as a service provider rather than an advocate?

### E. *Planned Parenthood as Provider*

In challenging its state's defunding law, Planned Parenthood of Indiana argued in part that the statute in question violated the Fourteenth Amendment right to abortion.<sup>222</sup> In response, the State of Indiana and anti-abortion amici launched a much broader effort to narrow *Roe*.<sup>223</sup> In particular, the State has argued that "the

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220. See *id.* at 199 n.5 ("[T]he recipient remains free to use private, non-Title X funds to finance abortion-related activities."); *Maher*, 432 U.S. at 474 ("An indigent woman . . . continues as before to be dependent on private sources for the service she desires.").

221. See *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980).

222. Memorandum of Law in Support of Motion for Temporary Restraining Order and Motion for Preliminary Injunction at 23, *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011) (No. 11-2464) ("Although the Court has not explicitly held that the person performing the abortion has a similar or derivative right to perform abortions, it has certainly intimated that the constitutional concerns in this regard are shared by the persons conducting the abortions.").

223. See Defendants' Memorandum in Opposition to the Motion for Preliminary Injunction, *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State*

Supreme Court has never held that providers or physicians have an independent constitutional right to perform abortions or any other medical procedure.”<sup>224</sup> In short, the State and anti-abortion amici contended, *Roe* recognized only a right to seek out an abortion; there was no freestanding right to provide one.<sup>225</sup>

In making such constitutional arguments, Indiana and anti-abortion amici appeared limited by existing constitutional doctrine. In particular, no brief has stressed the woman-protective arguments that had been so successful in the political arena. At the same time, however, the constraints imposed by litigation drew attention to a promising, independent course of action: the revival of earlier efforts to narrow the scope of the abortion right recognized in *Roe*.

These efforts began in the mid-1970s, when the newly formed AUL submitted an amicus curiae brief in *Planned Parenthood of Central Missouri v. Danforth*, the Supreme Court’s first major anti-abortion case after *Roe*.<sup>226</sup> Rather than asking for *Roe* to be overruled, the *Danforth* brief asked that the opinion be narrowed.<sup>227</sup> How was this accomplished? The AUL brief focused on the question of who held the right set forth in *Roe*. *Roe* itself was unclear on this point, suggesting at times that physicians as well as women might be rights-holders.<sup>228</sup>

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Dep’t of Health, 794 F. Supp. 2d 892 (S.D. Ind. 2011) (No. 11-2464) [hereinafter Defendant’s Memorandum in Opposition]; American Center for Law & Justice Brief, *supra* note 165, at 15, 22-23; Eagle Forum Brief, *supra* note 150, at 34; Indiana General Assembly Brief, *supra* note 167, at 5-7.

224. Defendants’ Memorandum in Opposition, *supra* note 223, at 21.

225. *See id.*; *see also* American Center for Law & Justice Brief, *supra* note 165, at 15, 22-23; Eagle Forum Brief, *supra* note 150, at 34; Indiana General Assembly Brief, *supra* note 167, at 5-7.

226. 428 U.S. 52 (1976).

227. *See* Motion and Brief, Amicus Curiae of Dr. Eugene Diamond and Americans United for Life, Inc., in Support of Appellees in 74-1151 and Appellants in 74-1419 at 17, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (Nos. 74-1151, 74-1419) [hereinafter AUL Brief].

228. *See Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (“[F]or the period of pregnancy prior to this ‘compelling’ point, the attending physician, in

In its *Danforth* brief, however, AUL at times suggested that the abortion right belonged only to women and was justified at least partly by the difficulties women confronted in childrearing.<sup>229</sup> It may at first seem surprising that anti-abortion attorneys would urge the Court to view *Roe* as a women's-rights decision, since a range of feminist scholars have also criticized *Roe* for paying inadequate attention to women's interest in fertility control.<sup>230</sup> For AUL, however, describing women as the only abortion rights-holders served a different purpose: when the constitutionality of spousal consent laws was still in question, it was easier for AUL attorneys to compare the rights of fathers to those of mothers rather than those of physicians.<sup>231</sup> For example, AUL argued that, like women, married men also bore the

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consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."); *id.* at 165-66 ("The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention.").

229. See AUL Brief, *supra* note 227, at 22, 30, 31-33, 109.

230. On *Roe's* focus on the physician's interests, see, for example, Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 85-86 (1995) ("Under *Roe*, the physician . . . is constitutionally required to lead the decisionmaking process." (footnote omitted)); Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175, 178 (2008) (describing *Roe's* "doctor-focused," rather than woman-focused, justification). For criticisms of *Roe's* failure to adequately address women's interest in abortion, see, for example, Ruth Bader Ginsburg, Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-1208 (1992); Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in ABORTION: MORAL AND LEGAL PERSPECTIVES 45, 45-53 (Jay L. Garfield & Patricia Hennessey eds., 1984); Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 273-80 (1992).

231. See AUL Brief, *supra* note 227, at 104 ("[E]ither or both marriage partners may suffer the legal, economic, social or psychological 'detriments' which, as this Court has observed, may result from pregnancy and subsequent parenthood; either or both may suffer social, economic, legal or psychological detrments as the result of an abortion." (footnote omitted)).

burdens of rearing a child and should enjoy rights over abortion themselves.<sup>232</sup>

In current litigation, Planned Parenthood has responded that providers must have rights in the abortion context if women's own constitutional rights are to mean anything.<sup>233</sup> As Planned Parenthood of Indiana argued: "[T]he interests of a woman seeking an abortion and those of the organization or practitioners performing the procedures are so close that when restrictions are placed on a practitioner, '[t]he woman's exercise of her right to abortion . . . is therefore necessarily at stake.'"<sup>234</sup> It would seem strange to conclude that women have a right to choose abortion without undue interference while permitting the State to prevent anyone from providing the procedure. If the undue burden test is to mean anything, of course, some restrictions on providers might constitute undue burdens, even if providers do not hold any rights in the abortion context.

Nonetheless, a clear conclusion that providers are not abortion rights-holders would be a considerable victory for the anti-abortion movement. First, such a conclusion would represent a significant expansion of the principle that women do not enjoy a right to have an abortion, only a liberty interest in choosing one. In *Singleton v. Wulff*, a 1976 decision about who had standing to bring challenges to abortion restrictions, the Court reserved the question of whether physicians had any right to provide an abortion, holding that physicians had third-party standing to challenge such a restriction on behalf of their patients.<sup>235</sup> In

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232. *See id.*

233. *See* Reply in Support of Motion for Preliminary Injunction at 14-16, *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011) (No. 11-2464); *see also* Brief of Amici Curiae NOW Legal Defense and Education Fund et al. in Support of the Petitioners at 4-9, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392) ("Recognizing that a woman needs medical advice to decide whether or not to continue a pregnancy, the Court has carefully protected the physician's role in the woman's decision-making process.").

234. Reply in Support of Motion for Preliminary Injunction, *supra* note 233, at 14 (quoting *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)).

235. *Singleton*, 428 U.S. at 114-18.

dicta, however, in concluding that physicians did have standing to assert the rights of their patients, the Court suggested that "[a] woman cannot safely secure an abortion without the aid of a physician."<sup>236</sup> If "the constitutionally protected abortion decision is one in which the physician is intimately involved," as *Singleton* asserted,<sup>237</sup> then the Court at least left open the possibility that providers had a stake in the abortion right. The defunding movement seeks to make clear that no such constitutional interest exists.

As importantly, if the Court concludes that only women enjoy abortion rights, such a conclusion would signal the Court's continuing willingness to undo the protections set forth in *Roe* without overruling it.<sup>238</sup> In 1989, in *Webster v. Reproductive Health Services*, for example, four of the justices in the plurality upholding a Missouri statute restricting abortion access conceded that they had "narrowed" *Roe*,<sup>239</sup> while Justice Scalia, writing in concurrence, concluded that the case had been effectively overruled.<sup>240</sup> If the Court clearly concludes that providers have no rights in the abortion decision, the right in *Roe*—to the extent that it exists at all—will be that much narrower.

### CONCLUSION

The movement to defund Planned Parenthood represents a new phase of the abortion struggle. Anti-abortion advocates have worked to expand and rework the idea that abortion is a negative right. Activists involved in the defunding movement suggest that, under *Maher* and *Harris*, the government may deny funding to abortion providers as well as for abortion services. Significantly, in the political arena, the defunding movement justifies this conclusion by claiming to speak for women. Organizations like Live Action emphasize that abortion facilitates the

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236. *See id.* at 117.

237. *Id.*

238. *See supra* notes 226-27 and accompanying text.

239. 492 U.S. 490, 521 (1989).

240. *Id.* at 532 (Scalia, J., concurring).

sexual exploitation of women and adolescents. In videos and in the media, abortion opponents portray Planned Parenthood and other abortion providers as willing to perform abortions even for exploited women and to do so without reporting apparent incidents of sexual abuse or statutory rape. The defunding movement offers a new perspective on what it means to be pro-woman and pro-life, one to which abortion-rights proponents will have to respond.

In the courts, the defunding movement has benefited from the constraints imposed by constitutional litigation. The movement has thus far abandoned its woman-protective arguments in court, instead reviving earlier anti-abortion claims about the scope of abortion rights. In defending defunding proposals, abortion opponents have once again endeavored to establish that providers enjoy no rights in the abortion context.

*Harris v. McRae* has, in many ways, been one of the anti-abortion movement's most significant victories. What does it mean that abortion is a negative right? In answering this question, the defunding movement has sought both to add a sex-equality dimension to *Harris* and to cut providers out of the constitutional abortion framework. What is the most effective counterargument to those made by the defunding movement? How will courts react to the new laws promoted by the movement? There are no straightforward answers to these questions. What is clear, however, is the difference they will make to the future of the abortion debate.



